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No. 06-984

In The Supreme Court of the United States

JOSE ERNESTO MEDELLIN,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Texas

BRIEF FOR RESPONDENT

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CAPITAL CASE

QUESTIONS PRESENTED

In the *Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31), the International Court of Justice determined that, based on violations of the Vienna Convention, 51 named Mexican nationals, including Petitioner José Ernesto Medellín, were entitled to receive review and reconsideration of their convictions and sentences through the judicial process in the United States. Subsequently, the President issued a "Memorandum for the Attorney General" ("Presidential Memorandum"), stating that he had determined that the United States would "discharge its international obligations under the decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision."

This case presents the following questions:

1. Does the Presidential Memorandum constitute binding federal law, and does it preempt the Texas criminal procedure statute governing the jurisdiction of state courts to review subsequent habeas applications?

2. Is *Avena* a binding judgment enforceable by a private party in a domestic court?

3. Have Texas courts already provided the merits review of Medellín's conviction and sentence that was required by *Avena*?

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STATEMENT OF THE CASE

The Crime: Petitioner's Statement of the Case begins in October 1994, when José Ernesto Medellín was sentenced to death for capital murder. Pet'r Br., at 2. But this case began over a year earlier, on June 24, 1993. That evening, fourteen-year-old Jennifer Ertman and sixteen-year-old Elizabeth Pena were returning home from visiting a girlfriend when, tragically, they took a shortcut. At around 11:15 p.m., they encountered Medellín and his fellow members of the "Black and Whites" gang, who had assembled to fight with and then initiate a new member, Raul Villareal. *Medellín* v. *State*, No. 71,997 (Tex. Crim. App. 1997); Resp. App., at 3.[1]

As the girls passed Medellín, he attempted to engage Elizabeth in conversation. *Id.*, at 4. When she tried to run, Medellín grabbed her and threw her to the ground. *Id.* Elizabeth screamed for Jennifer's help, but when Jennifer ran back she was grabbed by gang members Sean O'Brien and Peter Cantu and also thrown to the ground. *Id.*

As Medellín later confessed, what ensued was the brutal gang rape and murder of both Jennifer and Elizabeth. *Id.*, at 4-5. The gang members orally, vaginally, and anally raped both of them. *Id.* When they were done, they strangled both girls to death. *Id.*, at 5.

Later that evening, Medellín and other gang members went to Cantu's house, where he lived with his brother and sister-in-law, Joe and Christina Cantu. *Id.*, at 4. Christina asked the group what they had done that evening, and Medellín responded that they had "had fun" and that their exploits would be seen on the television news. *Id.* Medellín described to Joe and Christina how he had punched one of the girls because she had started screaming after he grabbed

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[1] Respondent is submitting a separately bound Appendix with its brief consisting of record materials before the Court in *Medellín* v. *Dretke*, 544 U.S. 660 (2005) (*Medellín I*), and contained in the Petitioner's Appendix and the Joint Appendix in *Medellín I*. Materials contained in the Appendix to Respondent's Brief will be referenced herein as "Resp. App." followed by the page numbers.

her. *Id.* Medellín went on to recount gang-raping both girls and showed them his blood-soaked underwear. *Id.*

When Christina asked the group what had happened to the girls, Medellín told her they had both been killed so they could not identify their attackers. *Id.*, at 5. Medellín explained that killing the girls would have been easier with a gun, but because they did not have one, he took off one of his shoelaces and strangled one of the girls with it. *Id.* Medellín complained of the difficulty in killing Jennifer and Elizabeth, relating that he had to put his foot on the throat of one of the girls because she would not die. *Id.*

Medellín and his gang members then divided up the money and jewelry taken from Jennifer and Elizabeth. *Id.* Medellín's brother kept one of the girls' Disney-brand Goofy watch, 30 TR. 640-42; 32 TR. 808;[2] Resp. App., at 36, and Medellín kept a ring belonging to Jennifer with an "E" design – which he later gave to his girlfriend, Resp. App., at 5.

After hearing Medellín's grisly tale, Christina Cantu convinced her husband in the ensuing days to report the crime to the police. *Id.* By the time Jennifer and Elizabeth's bodies were found, they were badly decomposed and identifiable only through dental records. *Id.* Based on the pattern of decomposition, the medical examiner determined that each girl had suffered enormous trauma to the genital region, 32 TR. 851-58, 872-75, 895, 897, 900-01, and had died of trauma to the neck consistent with strangulation, Resp. App., at 5-6.

At approximately 4:00 a.m. on June 29, 1993, Medellín was arrested. 30 TR. 629-30. Some two hours later, between 5:54 and 7:23 that morning, Medellín read his *Miranda* warnings aloud, signed a written waiver, and gave a detailed written confession of the crime. *See* Resp. App., at 32-36. His confession detailed, *inter alia*, how each girl had pleaded for her life, prior to being murdered. *Id.*, at 34.

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[2] "TR." refers to the reporter's record, preceded by the volume number and followed by the page numbers.

Although born in Mexico, Medellín has lived in the United States most of his life. 35 TR. 282-83. Medellín speaks, reads, and writes English, 30 TR. 648; 31 TR. 687; 35 TR. 283, and attended American public schools since elementary school, 30 TR. 648, 670; 35 TR. 283, 289-90. Nevertheless, he remains a citizen of Mexico, and the local law enforcement officers failed to notify him of his Vienna Convention right to notify his consulate. Pet'r Br., at 5.

Medellín was tried and convicted of murder during the course of a sexual assault, a capital offense. 33 TR. 66-68. The jury unanimously recommended a death sentence, and the district court sentenced Medellín to death. *Medellín I* Pet. App. 3a. At no point during trial, sentencing, or the subsequent direct appeal, did Medellín – who had the assistance of two court-appointed attorneys – assert any claim under the Vienna Convention.

Medellín's Appeal and First State Habeas Application: The Texas Court of Criminal Appeals affirmed Medellín's conviction and sentence in an unpublished opinion. *See* Exhibit B to Medellín's Application for Writ of Habeas Corpus ("First Application"). Rather than petition this Court for certiorari, Medellín contacted the Mexican consulate, and the consular authorities began assisting him with a state habeas corpus application. Eleven months later, Medellín filed his First Application seeking habeas corpus relief.

In his First Application, Medellín asserted for the first time that the failure to notify him of his right to inform the Mexican consulate of his arrest for capital murder violated his rights under the Vienna Convention on Consular Relations. *See* First Application at 25.[3] The district court rejected his Vienna Convention claim because, *inter alia*, it found that he failed to show that he was harmed by any failure to

[3] The only harm that Medellín alleged in his First Application as arising from the failure to notify him of his rights under the Vienna Convention was that his confession should not have been considered by the jury because it was "obtained in violation of the Vienna Convention on Consular Relations." First Application at 31.

notify the consulate. Specifically, the district court found that Medellín "fail[ed] to show that any non-notification of the Mexican authorities impacted on the validity of his conviction or punishment." Resp. App., at 62. The Texas Court of Criminal Appeals found the trial court's conclusions to be supported by the record and denied relief. *Id.*, at 64-65.

Federal Habeas Proceedings in the District Court and the Fifth Circuit: After his First Application was rejected, Medellín filed a petition for a writ of habeas corpus in federal district court. *See Medellín* v. *Cockrell*, No. H-01-4078 (S.D. Tex. June 26, 2003); Resp. App., at 66-127. Medellín claimed that he should receive a new trial because he had not been advised of his right to consular notification under the Vienna Convention. *Id.*, at 86.

The federal district court rejected that claim, holding that Medellín's failure to raise his Vienna Convention claim at trial as required by Texas's contemporaneous-objection rule constituted an adequate and independent state ground barring federal habeas review. *See id.*, at 86-92. Applying the Court's decision in *Breard* v. *Greene*, 523 U.S. 371, 375-76 (1998) (per curiam), the court also rejected Medellín's argument that Vienna Convention claims are exempt from the procedural-default doctrine. Resp. App., at 87-88.[4] Finally, the federal district court, like the state courts, rejected Medellín's Vienna Convention claim on the merits. The court expressly found that Medellín "failed to show prejudice for the Vienna Convention violation," *id.*, at 92, and concluded that the state

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[4] Medellín argued that the federal court should follow the post-*Breard* decision of the International Court of Justice in *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27). In *LaGrand*, the ICJ determined that the consular notification provisions in Article 36 of the Vienna Convention created individual rights, and that the application of procedural default to preclude the LaGrands from challenging their convictions violated Article 36(2) of the treaty by "preventing 'full effect [from being] given to the purposes for which the [consular notification] rights accorded under this article are intended.'" *Id.*, ¶91, at 497-98. Noting the conflict between *LaGrand* and *Breard*, the district court declined to follow *LaGrand*'s holding that procedural default should not apply to Vienna Convention claims. Resp. App., at 89-91.

court's determination that he failed to show "concrete, non-speculative harm" was not "'contrary to, or an unreasonable application of, federal law.'" *Id.* (quoting 28 U.S.C. §2254(d)(1)). The district court denied both Medellín's claim for habeas relief and declined to grant a certificate of appealability. *Id.*, at 126.

Medellín subsequently applied to the Fifth Circuit for a COA, which was denied. *See Medellín* v. *Dretke*, 371 F.3d 270 (CA5 2004); *Medellín I* Pet. App. 119a-135a.[5] While Medellín's application for COA was pending in the Fifth Circuit, the ICJ issued its decision in *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31); Appendix to the Petition ("Pet. App.") at 86a-186a.

In *Avena*, the ICJ concluded that the United States had violated Article 36 of the Vienna Convention in the case of Medellín and 50 other Mexican nationals. *Id.*, at ¶¶106, 153; Pet. App. 155a-57a, 182a-85a. The ICJ rejected Mexico's request for annulment of the convictions and sentences, and concluded that the remedy for the Article 36 violations was that the United States must provide "review and reconsideration" of the sentences and convictions of Medellín and the other 50 Mexican nationals. *See id.*, at ¶¶14, 121-23, 153(9); Pet. App. 106a-07a, 165a-66a, 185a. The ICJ further ordered that the "review and reconsideration" must take place within the judicial system of the United States, and that the doctrine of procedural default could not bar such review. *See id.*, at ¶¶111-13, 120-22, 133-34, 138-41; Pet. App. 159a-61a, 164a-65a, 170a-71a, 173a-74a.

The Fifth Circuit acknowledged the ICJ's decisions in *Avena* and *LaGrand*, but concluded that it was bound instead by this Court's decision in *Breard* that Vienna Convention claims are subject to procedural default. *See Medellín I* Pet. App. 132a. The court also held that Medellín could not prevail because a prior Fifth Circuit panel had held that Article 36 of

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[5] Citations to materials in the Appendix to Medellín's prior petition for a writ of certiorari submitted in *Medellín I* will be referenced herein as "*Medellín I* Pet. App.," followed by the page number(s).

the Vienna Convention does not create an individually enforceable right. *Id.*, at 133a.

***Medellín I*: Medellín's First Petition for a Writ of Certiorari:** The Court granted certiorari to resolve two questions: (1) whether a federal court was bound by the ICJ's *Avena* decision that U.S. courts must reconsider Medellín's Vienna Convention claim without regard to procedural default doctrines; and (2) whether a federal court must give effect to the ICJ's *Avena* decision as a matter of judicial comity and uniform treaty interpretation. *Medellín* v. *Dretke*, 544 U.S. 660, 661 (2005) (per curiam) (*Medellín I*).

While the case was pending before the Court, the President issued a document styled as a "Memorandum for the Attorney General." Pet. App. 187a. The operative language of the memorandum reads as follows:

> "I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision." *Id.*

The U.S. Attorney General then mailed the memorandum to various state officials, including the Attorney General of Texas. Pet. App. 76a. After the Presidential Memorandum issued, Medellín filed a subsequent state habeas application. The subsequent application relied on the memorandum and the *Avena* decision as separate bases for relief that had not been available when he filed his first state habeas application. *Medellín*, 544 U.S., at 663-64. Based in part on both the Presidential Memorandum and the filing of Medellín's subsequent state habeas application, the Court dismissed the writ as improvidently granted. *Id.*, at 666-67.

Proceedings in the Texas Court of Criminal Appeals on Medellín's Subsequent Application for State Habeas Relief: Under Article 11.071, Section 5(a) of the Texas Code of Criminal Procedure, Texas courts lack jurisdiction to consider

the merits of any claims raised on a subsequent habeas application, or grant relief on such claims, unless the applicant provides specific facts demonstrating that:

> "the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application." TEX. CODE CRIM. PROC. art. 11.071, §5(a)(1);[6] *see also Ex parte Graves*, 70 S.W.3d 103, 115 (Tex. Crim. App. 2002).

In support of his subsequent habeas application, Medellín argued that the *Avena* decision and the Presidential Memorandum constituted binding federal law that preempt Article 11.071. *See* Br. of Applicant, at 26-27. Alternatively, Medellín argued that he met the requirements of Article 11.071 because *Avena* and the Presidential Memorandum constituted factual and legal bases that were unavailable when he filed his first state habeas application. *Id.*, at 52-53.

The Texas Court of Criminal Appeals disagreed. It rejected Medellín's claim that *Avena* preempts Article 11.071, concluding that in *Sanchez-Llamas* this Court considered and rejected the argument that ICJ decisions are binding federal law. Pet. App. 21a-24a. It also rejected Medellín's argument that the Presidential Memorandum preempts Article 11.071 and requires Texas courts to review and reconsider Medellín's conviction and sentence. Although all of the members of the Court of Criminal Appeals agreed that the Presidential Memorandum did not preempt Article 11.071, the court did not generate a majority opinion on this issue. *See* Pet. App. 1a, 24a-55a, 64a-71a, 74a-79a.

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[6] Although both Petitioner and the United States urge this Court that Article 11.071 should be preempted, neither quotes or discusses in any way the text of that provision of the Texas Code of Criminal Procedure.

Judge Keasler's plurality opinion,[7] Pet. App. 24a-55a, assumed – without deciding – that the memorandum constituted an executive order requiring Texas's compliance. Pet. App. 24a-25a. The plurality observed, however, that, "[e]xecutive orders issued by the President must be authorized by an act of Congress or by the Constitution." Pet. App. 27a (citing *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 585 (1952)). Treating the Presidential Memorandum as an order intended to bind Texas courts, the plurality considered the memorandum to be an "unprecedented" exercise of executive power, Pet. App. 29a, and held that the President had exceeded his constitutional authority "by intruding into the independent power of the judiciary." Pet. App. 30a. The plurality also concluded that the Presidential Memorandum – like the *Avena* decision itself – improperly attempts to invest the ICJ with the power to determine the meaning and effect of a treaty as a matter of United States domestic law. *See id.*

Presiding Judge Keller filed a concurring opinion stating that the President does not have the power to order a state court to ignore rules of procedural default and statutes governing successive habeas corpus petitions. Pet. App. 64a-65a. She observed that the Court has typically declined to construe executive agreements or treaties as preempting state laws involving "traditional area[s] of state competence and applied equally to citizens and non-citizens," Pet. App. 67a, most recently in the *Sanchez-Llamas* decision recognizing that the Vienna Convention does not preempt state rules of procedural default, *id.* (citing *Sanchez-Llamas* v. *Oregon*, 126 S.Ct. 2669, 2682-88 (2006)). She went on to conclude that, to the extent that the President is purporting to preempt state criminal procedure statutes through his memorandum, he is not acting pursuant to any authorization conferred by the Vienna Convention or the Optional Protocol. *See id.* Based on this analysis, Presiding Judge Keller concluded that the President's "unprecedented, unnecessary, and intrusive exercise of power over the Texas court system

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[7] This opinion was joined by Judges Meyers, Price, and Hervey. Pet. App. 1a.

cannot be supported by the foreign policy authority conferred on him by the United States Constitution." Pet. App. 71a.[8]

Finally, the Court of Criminal Appeals held that, as a matter of state law, neither *Avena* nor the Presidential Memorandum constituted a previously unavailable "factual basis" or "legal basis" for Medellín's habeas claims, and therefore his subsequent application did not meet the requirements of Article 11.071 so as to permit jurisdiction to provide review of his Vienna Convention claim. Pet. App. 56a-64a.[9]

SUMMARY OF THE ARGUMENT

This is a separation of powers case. It implicates every axis of the structural limitations on government: President vis-à-vis Congress, President vis-à-vis the Supreme Court, international law vis-à-vis domestic law, federal government vis-à-vis the States, and, with a Möbius twist, President vis-à-vis the state judiciary. Each of the structural limits on government serves to diffuse power and to safeguard the citizenry, and only by ensuring the vitality of those democratic checks on unilateral authority can liberty be secured.

The United States defends the Presidential Memorandum, as it must, while candidly admitting that it represents an "unprecedented action." For good reason: The Presidential Memorandum transgresses the authority of Congress, of the judiciary, and of the States.

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[8] Judge Hervey and Cochran also filed opinions concurring in the court's decision that the Presidential Memorandum does not preempt Article 11.071. Pet. App. 74a-79a. Judge Hervey, referencing the alternative merits holding in Medellín's First Application that he failed to establish that he suffered any prejudice from the Vienna Convention violation, concluded that the "review and reconsideration" required by *Avena* and the Presidential Memorandum has already occurred, and the case therefore presents no actual controversy. Pet. App. 74a. Judge Cochran could not "accept the proposition that binding federal law . . . can be accomplished through a Presidential press release of a private memorandum directed to the Attorney General." Pet. App. 78a-79a.

[9] Medellín's Petition for Writ of Certiorari does not ask the Court to review this state-law determination of the Court of Criminal Appeals.

The Presidential Memorandum contradicts the express understanding under which the Senate ratified the Vienna Convention, the UN Charter, and the Optional Protocol. The Senate understood – and, until recently, the Executive Branch embraced – three key limitations on those treaties. First, they create no individual rights. Second, they are enforceable politically and diplomatically, through the Security Council, and not through domestic courts of law. And third, they were not intended to alter preexisting U.S. law. The United States agrees that these three limitations inhere to the treaties, but, nonetheless, the Presidential Memorandum purports to create individual rights, to make them enforceable in state courts, and to displace neutral state laws of criminal procedure. Because the memorandum attempts to mandate an outcome antithetical to that contemplated by the Senate, and because that outcome also conflicts with the policy judgments of Congress expressed in the AEDPA, the Presidential Memorandum is contrary to the will of Congress.

The Presidential Memorandum also intrudes onto the constitutional role of the judiciary, in two respects. First, this Court, in *Sanchez-Llamas*, definitively interpreted – as a matter of federal law – the domestic import of *Avena* and the applicability of the procedural default doctrine to violations of the Vienna Convention. Nonetheless, the United States contends, state courts should obey the memorandum – and not this Court's decision in *Sanchez-Llamas* – in adjudicating those same questions. Under the most foundational principles of *Marbury* and Article III, it is emphatically not the province of the President to say what federal treaty law is, nor how *Avena* or the Vienna Convention should be interpreted. Second, the memorandum impermissibly attempts to reopen final criminal judgments, and to order the state courts to do what the federal courts could not.

The Presidential Memorandum also intrudes onto the sovereignty of the States. The memorandum purports to expand the jurisdiction of the state courts, beyond what state law allows, and to commandeer state judges into service of the federal Executive. Our Federalism allows no such dictates.

Finally, to avoid constitutional doubt, the Court should construe the memorandum as a request, not a command. In the alternative, because both the state and federal habeas courts expressly found that the Vienna Convention violation produced no actual prejudice, the Court should conclude that the "review and reconsideration" required by *Avena* and the Presidential Memorandum has already occurred, and so Petitioner's claim is moot.

The United States may comply with *Avena*, if it chooses, but it must do so in a way consonant with the constitutional limitations. Several avenues are available, but all require working in conjunction with either Congress or the States. Thus, by mandating inter-branch cooperation, the Constitution protects liberty and prevents unilateral fiat, in derogation of laws adopted by democratically elected legislatures.

ARGUMENT

Petitioner's argument is relatively straightforward. Proceeding from the premise that he advanced in *Medellín I* – and that this Court rejected in *Sanchez-Llamas* – he urges that the "judgment of the ICJ" is "binding" on the United States and on "all its judicial organs." Pet'r Br. 20. Hence, this Court may no more decide the matter differently from the ICJ than could a federal district court disregard a holding of this Court. That understanding of the relationship between this Supreme Court and the ICJ is profoundly wrong, see Part VII, *infra*, but it at least has the virtue of analytical consistency.

The position of the United States, however, is considerably more nuanced. The United States does not embrace – indeed, it emphatically rejects – Petitioner's views concerning the domestic reach of the ICJ and the Vienna Convention. Thus, the United States agrees with Texas on the following:

- The Vienna Convention creates no individual rights.
- Neither the Vienna Convention, the UN Charter, nor the Optional Protocol are "self-executing" in the broader sense; that is, none of them (absent more) are judicially enforceable in U.S. courts.

- The ICJ's decision in *Avena* was, as a matter of federal law, wrong, and it too (absent more) cannot be enforced in U.S. courts.

Thus, with those predicates – and forswearing Petitioner's reliance on broader theories of international law – the United States nonetheless is forced to defend the Presidential Memorandum as a valid exercise of Executive authority. Because, the argument goes, the United States has a diplomatically-enforceable treaty obligation to comply with decisions of the ICJ, the President may choose whatever means of doing so – including setting aside state law – without securing the concurrence of any other branch of government.

To be sure, Texas recognizes the existence of an international obligation to comply with the United States's treaty commitments, including, as appropriate, through changes to domestic law. And the Presidential Memorandum surely reflects the President's genuine desire to "reaffirm[] the United States commitment to the international rule of law." U.S. Br., at 4. However, a laudable goal does not give the President unlimited power to act beyond his constitutional authority. As the Court has recognized, "the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *New York* v. *United States*, 505 U.S. 144, 187 (1992).

Thus, the Constitution requires interbranch cooperation between the President and Congress before an ICJ decision can become judicially cognizable domestic law. As the Court has long recognized, "'The power to make the necessary laws is in the Congress; the power to execute in the President.'" *Hamdan* v. *Rumsfeld*, 126 S.Ct. 2749, 2773 (2006) (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139-40 (1866)).

The United States has candidly acknowledged that the Presidential Memorandum is "an unprecedented action."[10]

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[10] *See* Brief of the United States as Amicus Curiae Supporting Respondent, at 29-30 submitted in *Sanchez-Llamas* v. *Oregon*, 126 S.Ct. 2669 (2006) [U.S. Br. in *Sanchez-Llamas*].

And this "unprecedented" assertion of sweeping presidential authority runs afoul of fundamental canons of separation of powers and federalism. It infringes on the authority of Congress, it infringes on the constitutional role of the judiciary, and it infringes on the sovereignty of the States.

I. THE PRESIDENTIAL MEMORANDUM IMPERMISSIBLY INTRUDES ON THE AUTHORITY OF CONGRESS.

Because the Presidential Memorandum impermissibly usurps Congress's authority to transform international law obligations into domestic rules of law, and because it is likewise incompatible with the will of Congress concerning the domestic effect of ICJ decisions, it falls outside the ambit of unilateral presidential action.

A. The President Lacks Authority to Unilaterally Transform an International Obligation into Domestic Law.

1. The creation of domestic law incident to treaties requires interbranch cooperation between the President and Congress.

Not every treaty creates domestic law rights, obligations, or powers. Rather, the general rule is that "[i]nternational agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §907, cmt. (A) (1987). This rule derives from the longstanding principle that "[a] treaty is primarily a compact between independent nations," and that it "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." *The Head Money Cases*, 112 U.S. 580, 598 (1884).

Accordingly, where a treaty does not "by its own force,"[11] create law cognizable in domestic courts, the President and the Senate have made a decision that the treaty remains unenforceable in the courts without further congressional action. Thus, unless the text of the treaty reflects an agreement between the President and the Senate to create domestic law, no such law is made.

This requirement stems from the text of the Constitution, which divides the federal government's treaty-making authority between the President and Congress. The President has a general power to "make" treaties, but Article II, Section 2, qualifies that power by requiring the consent of two-thirds of the Senate before a treaty becomes the "supreme Law of the Land." Accordingly, the President is bound by the reservations, understandings, or other conditions imposed by the Senate upon granting its consent. *See* RESTATEMENT (THIRD) §314, cmt. b ("Since the President can make a treaty only with the advice and consent of the Senate, he must give effect to conditions imposed by the Senate upon its consent."). Such conditions necessarily include a treaty's effect in domestic law.[12]

Similarly, outside the treaty-ratification process, the Constitution provides Congress, not the President, the power to transform an international obligation into domestic law. That authority flows from the Necessary and Proper Clause of Article I, which allocates to Congress the authority to "carry [] into Execution . . . all other Powers vested by this Constitution" in the federal government, U.S. CONST. art. I, §8, cl. 18, including the Article II treaty power. *See Missouri* v. *Holland*, 252 U.S. 416, 431-32 (1920). Thus, when a treaty does not of

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[11] *See, e.g.*, *The Chinese Exclusion Case*, 130 U.S. 581, 600 (1889) (describing a treaty directly enforceable in domestic courts).

[12] For example, the Senate has typically declared that human rights treaties are not self-executing. *See* Comm. on Foreign Relations, International Covenant on Civil and Political Rights, S. EXEC. REP. NO. 102-23, at 9, 19, 23 (1994); Comm. on Foreign Relations, Covenant Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. EXEC. REP. NO. 101-30, at 30-31 (1992).

its own force create directly enforceable domestic law, Congress has the authority to enact implementing legislation.

The Court has long recognized that the responsibility for transforming an international law obligation into a domestic rule of law falls to Congress, not the President. Chief Justice Marshall enunciated this principle in *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 315 (1829): where a treaty merely represents a promise of the United States under international law, "the ratification and confirmation which are promised must be the act of the legislature. Until such act shall be passed, the Court is not at liberty to disregard the existing laws on the subject." *Id.*, at 315; *see also Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888) ("When the stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect. . . ."). Although treaties "may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms." *Igartua-De La Rosa* v. *United States*, 417 F.3d 145, 150 (CA1 2005) (en banc).

2. The President is limited to executing, not creating, the law.

The United States's sweeping assertion of presidential power to create domestic law also suffers from an arguably more fundamental problem. Whatever the proper scope of the President's implied foreign-affairs powers are under Article II, this Court has consistently recognized that such powers are limited to executing, not creating, the law.

As the Court explained in *Youngstown*, "[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. . . . And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute." *Youngstown*, 343 U.S., at 587-88. The Court reaffirmed this principle just last Term in *Hamdan* v. *Rumsfeld*, 126 S.Ct. 2749 (2006), in its rejection of unilateral executive authority to create special military tribunals beyond the scope of congressional authorization, *id.*, at 2773.

The application of this fundamental separation-of-powers principle is particularly important where, as here, the unilateral action of the Executive Branch directly infringes on the States' authority as sovereigns to order their own judicial departments and criminal-justice systems. *See* Part III.A, *infra*. Congress must be involved in political decisions, such as the one here, that threaten the sovereign capacity of the individual states. As the Court explained in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the States' representation in Congress injects the "political safeguards of federalism" into the political process. *Id.*, at 551 n.11. As one prominent commentator has observed, "[t]he proposition that the President may, by reaching an agreement with a foreign head of state, essentially destroy the sovereign power of one of the United States is not easily reconcilable with the deep-seated notion that *Congress* is the branch of the national government that is to be trusted most to protect state sovereignty." 1 Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW §4-4, at 648 (3d ed. 2000) (emphasis in original).

B. The Presidential Memorandum Reflects an Assertion of Presidential Power at Its "Lowest Ebb" Under *Youngstown*.

The validity of a President's exercise of his foreign-affairs power has traditionally been evaluated under the familiar tripartite test for whether his actions are undertaken (1) with the express or implied authorization of Congress, (2) in the absence of congressional authorization or denial of authority, or (3) in contravention of the will of Congress. *See Youngstown*, 343 U.S., at 635 (Jackson, J., concurring). The United States constructs much of its argument upon its foundational premise that the Presidential Memorandum falls within the first *Youngstown* category, where presidential power is at its zenith. U.S. Br., at 10-11. That premise is false.

The United States's attempt to characterize this case as a *Youngstown* "category one" case is based on the simple observation that the Senate ratified the Vienna Convention, the UN Charter, and the Optional Protocol. That is certainly

true. But it did so with a very different understanding of how those treaties would affect U.S. law.

As interpreted by the Department of Justice, the Presidential Memorandum has the effect of (1) creating individual rights for the 51 named Mexican nationals, (2) empowering (indeed requiring) state courts and this Court to enforce those rights, (3) preempting neutral, generally applicable state criminal laws, and (4) reopening final criminal judgments in state court.

When one assays what the Senate actually understood and ratified – and compares it to the legal effect now urged by the United States – there can be no other reasonable conclusion but that the Presidential Memorandum is contrary to the will of Congress, and therefore at the "lowest ebb" of presidential power. This is so for four separate reasons. *First*, the memorandum contravenes the Senate's express understanding, manifest when it ratified the Vienna Convention, that the treaty created no individual rights. *Second*, it contradicts the Senate's express understanding, manifest when it ratified the UN Charter and the Optional Protocol, that ICJ decisions can be enforced only through diplomatic or political means. *Third*, by attempting to alter the very structure of the Texas system of criminal procedure, the memorandum also conflicts with the Senate's express understanding that the United States's obligations under the Vienna Convention did not include any changes in domestic law. And *fourth*, the Presidential Memorandum is incompatible with the deference to state court criminal procedures required by Congress in the AEDPA.

1. The Senate ratified the Vienna Convention with the express understanding that it created no individual rights.

As the United States has exhaustively and persuasively argued, *see* U.S. Br. in *Sanchez-Llamas*, at 11-30, when the Senate ratified the Vienna Convention, it did so with the explicit understanding that the treaty did not create individual rights. The best evidence of what the Senate had before it is the actual text. The Convention expressly provides,

> "the *purpose* of [the] privileges and immunities [discussed in the Convention] is *not to benefit individuals*

but to ensure the performance of functions by consular posts on behalf of their respective States." *Id.* (emphasis added).

Not only is the text explicit, the structure is clear. Chapter II of the Convention, in which Article 36 appears, is entitled "Facilities, Privileges and Immunities Relating to Consular Posts, Career Consular Officers and Other Members of a Consular Post." Its focus is the prerogatives of the "sending State," not individual foreign nationals. Article 36 is in Section I of Chapter II – a Section titled "Facilities, Privileges and Immunities Relating to a Consular Post." Notably, it is not found in Section II, which deals with facilities, privileges, and immunities of individuals, *i.e.*, consular officers and other "members of the consular post."

In keeping with the overall purpose of the Convention, Article 36 begins with the express statement that the provisions of paragraph (1), including the requirements of consular notification at issue in this case, are established "*with a view to facilitating the exercise of consular functions* relating to nationals of the sending State" (emphasis added).

Although Article 36 may provide some collateral benefits to individual foreign nationals, its overriding purpose (as it notes explicitly) is to facilitate the performance of consular functions by consular officials. Looking to its drafting history, the text of Article 36 was submitted to the UN Conference by the International Law Commission (ILC). The Article's proponent on the ILC, Sir Gerald Fitzmaurice, explained that "[t]o regard the question as one involving primarily human rights or the status of aliens would be to confuse the issue." *Summary Records of the 535th Meeting*, [1960] 1 Y.B. Int'l L. Comm'n U.N. Doc. A/CN.4/SER.A/1960, at 49. Instead, the consular notification provisions "were intended to provide a consul with the means of carrying out the function of protection." *Id.*[13]

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[13] Likewise, Mr. Erim expressly agreed "that the proposed new article . . . dealt with the rights and duties of consuls and *not with the protection of human rights* or the status of aliens." *Id.* (emphasis added).

Indeed, the ILC drafters explained further that, "where a country did not carry out a provision of a convention, it would naturally be estopped from invoking that provision against other participating countries," *id.* – a proposed remedy that clearly illustrates their focus was on the rights of nations, not individuals.[14]

As the United States has succinctly explained, at the time of ratification, the Vienna Convention was simply "not understood to have the *radical effect* of creating individual rights." U.S. Br. in *Sanchez-Llamas*, at 22 (emphasis added). Of course, that "radical effect" – unforseen and unintended by the Senate – is precisely what the Presidential Memorandum now purports to accomplish.

2. The Senate ratified both the UN Charter and the Optional Protocol with the express understanding that decisions of the ICJ were not judicially enforceable.

The UN Charter and the ICJ's statute together delineate the scope of the ICJ's authority. The ICJ can hear only disputes between nations, Statute of the International Court of Justice art. 34, para. 1, 59 Stat. 1055 (1945) (hereinafter ICJ Statute), and then only when those nations have expressly consented to the ICJ's jurisdiction, *see* Vienna Convention, art. 36(2) & (3).[15] ICJ decisions have binding force only between the parties, which must be sovereign nations, and only with respect to the particular dispute, *id.* art. 59.

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[14] The Senate's understanding that the Vienna Convention created no individual rights mirrored that of every other signatory. As the United States observed, "[n]either petitioners [in *Sanchez-Llamas*] nor their amici offer a single unambiguous example in the 40-year history of the Vienna Convention from any of its 161 parties of an individual defendant being afforded a remedy in his criminal case on the basis of a Vienna Convention violation." U.S. Br. in *Sanchez-Llamas*, at 8.

[15] UN members have the option of submitting to the Court's full "compulsory jurisdiction" under article 36(2), or subject to specific reservations under article 36(3). Otherwise, jurisdiction can be by special agreement or by treaty under article 36(1).

Indeed, the ICJ statute specifies that, in all other instances, decisions of the court have "no binding force." *Id.*[16]

As a result, the ICJ lacks jurisdiction to declare individual rights, and its decisions have no *res judicata* effect on disputes between individual persons. *See, e.g., Socobel* v. *The Greek State*, 30 Avril 1950, 18 I.L.R. 3. ICJ judgments are "final and without appeal," but there is no rule regarding the application of those decisions before other tribunals. ICJ Statute art. 60.

Nor does the ICJ have direct enforcement powers. Instead, the Security Council enforces ICJ judgments in its political discretion. Article 94 of the UN Charter expressly provides:

> "1. Each Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party.
>
> 2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party *may have recourse to the Security Council*, which may, *if it deems necessary*, make recommendations or decide upon measures to be taken to give effect to the judgment." UN Charter art. 94 (emphases added).

Thus, while there exists in principle an international law obligation to respect the ICJ's judgments, ultimate enforcement power is given not to the ICJ – nor to the domestic courts of signatory nations – but to the Security Council, which exercises the political and institutional authority to enforce the ICJ's decisions.

The ratification history concerning the Senate's consent to the UN Charter and to the compulsory jurisdiction of the

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[16] *See Comm. of U.S. Citizens Living in Nicaragua* v. *Reagan*, 859 F.2d 929, 938 (CADC 1988) (Articles 92 and 94 of the UN Charter "make clear that the purpose of establishing the ICJ was to resolve disputes *between national governments*. We find in these clauses no intent to vest citizens who reside in a UN member nation with authority to enforce an ICJ decision against their own government."); *see also In re Investigation of World Arrangements with Relation to the Prod., Transp., Ref. and Distrib. of Petrol.*, 13 F.R.D. 280, 290-91 (D.D.C. 1952) (refusing to give controlling effect to the ICJ's ruling regarding United Kingdom's ownership of asset).

ICJ also highlights its understanding that ICJ judgments could be enforced only by the Security Council. First, there was clear Executive Branch testimony to this effect:

> "Although parties to cases are obligated to comply with the decisions of the Court, *which is a moral obligation* based on the provisions of the Charter, *there is no provision for the enforcement of such decisions* unless the failure to comply constitutes a threat to the peace or breach of the peace under article 39 of the Charter. There is an article in the Charter (art. 94, par. 2) which provides that *a party may resort to the Security Council* if the other party fails to carry out the judgment and that the Security Council may, *if it deems necessary*, make recommendations or decide upon measures to be taken to give effect to the judgment. This Government takes the position that the [Security] Council's action under this article is limited by the scope of its powers as defined in article 39, that is, it must first be determined by the Security Council that the breach constitutes a threat to, or breach of, the peace or an act of aggression."[17]

Moreover, in the debate on acceptance of compulsory jurisdiction, Senator Connally offered an amendment providing that American consent to jurisdiction did not apply to matters within the domestic jurisdiction of the United States as determined by the United States. 92 Cong. Rec. 10,694-95 (1946). Opponents of the Connally Amendment urged that it was unnecessary because the proposed limitation was inherent in the ICJ's jurisdiction and, if the ICJ exceeded its jurisdiction in any case, the judgment could be enforced only in the Security Council, where the United States could exercise a veto.[18] Senator Connally agreed with the opponents

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[17] *A Resolution Proposing Acceptance of Compulsory Jurisdiction of International Court of Justice: Hearings on S. Res. 196 Before the Subcomm. of the Senate Comm. on Foreign Relations*, 79th Cong., 2d Sess. 142 (1946) (statement of Charles Fahy, State Department Legal Adviser) (emphases added).

[18] 92 Cong. Rec. 10,694 (1946) (statement of Senator Pepper) ("The power of effective enforcement lies *only in the Security Council*, and in the

(Continued on following page)

of the amendment concerning the means of enforcing ICJ judgments, but argued for avoiding a situation in which the United States would be forced to exercise its veto. *Id.*, at 10,695 (statement of Sen. Connally). Critically, not a single Senator expressed the view that acceptance of the ICJ's jurisdiction would obligate American courts to enforce its judgments as domestic law, and the entire discussion of the Connally Amendment would make no sense if anyone had had that understanding.

Nor was the Senate's understanding unique; it reflected the understanding of every other signatory nation as well. Indeed, Petitioner and his amici have not pointed to a single nation that has ever inferred from Article 94(1) an obligation on the part of a state's judiciary independently to compel compliance with ICJ decisions. As the D.C. Circuit observed, "the words of Article 94 'do not by their terms confer rights upon individual citizens; they call upon governments to take certain action.'" *Comm. of United States Citizens Living in Nicaragua* v. *Reagan*, 859 F.2d 929, 938 (CADC 1988).

Upon ratification, the Senate's understanding was that the UN Charter would provide no domestic enforcement of ICJ decisions. Likewise, the Senate understood the Optional Protocol as providing only diplomatic and political remedies. The Optional Protocol provides,

> "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the [ICJ] and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol." Optional Protocol to Vienna on Consular Relations Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 77 (P.A. 138a).

Neither the language, legislative history, nor the application of the Optional Protocol supports the United States's contention that the President may unilaterally render an ICJ

Security Council an effective decision cannot be made to take action against a nation unless there is a unanimity of the Big Five." (emphasis added)).

decision binding in U.S. courts. First, the text of the Protocol contains no language indicating that the ICJ's decisions will be enforceable in the domestic courts of member nations.[19] Such an interpretation would contravene the plain directive of the UN Charter that it is the Security Council, not the domestic courts of member states, that is the "recourse" to enforce ICJ decisions. UN Charter art. 94.

Second, the ratification history concerning this aspect of the Optional Protocol is directly to the contrary. As the State Department explained in testimony before the Senate,

> "[i]f problems should arise regarding the interpretation or application of the [Vienna Convention], such problems would probably be resolved through *diplomatic* channels." S. Exec. Rep. No. 91-9 (1969) (Statement of J. Edward Lyerly, Deputy Legal Adviser for Administration) (emphasis added).

Indeed, as noted by the United States, U.S. Br., at 29, the *Avena* decision itself does not purport to be privately enforceable of its own force based upon either the Optional Protocol or the UN Charter. Rather, it provides that the United States is obligated "to provide, *by means of its own choosing*, review and reconsideration of the convictions and sentences of the

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[19] Some confusion may be engendered because courts often use the term "self-executing" to refer to two disparate concepts. Its narrowest meaning is whether a particular treaty takes effect upon ratification without requiring a separate implementing statute. RESTATEMENT (THIRD) OF FOREIGN RELATIONS §111(4). Respondent agrees that the Vienna Convention is self-executing in that no implementing legislation was required.

However, the broader (and more relevant) meaning of "self-executing" – whether the terms of a treaty provide for private rights that are enforceable in domestic courts – is a wholly separate question. *See id.*, at §111, cmt. h; *see also United States* v. *Li*, 206 F.3d 56, 68 (CA1 2000) (Selya and Boudin, JJ., concurring) ("That courts sometimes discuss [self-execution in the sense of need for implementing legislation and self-execution as creating individual rights] together . . . does not detract from their distinctiveness. At bottom, the questions remain separate.").

[affected Mexican nationals]." Pet. App. 185a (emphasis added). Thus, even the ICJ in *Avena* did not imagine that its judgment would have direct effect in U.S. courts.

3. The Senate ratified the Vienna Convention with the express understanding that it would not alter domestic law.

The Presidential Memorandum also conflicts with both Congress's and the President's understanding of the effect in domestic law of the Vienna Convention when it was ratified. As the United States has consistently argued, when the Vienna Convention was ratified neither the President nor the Senate understood that it would change domestic law. *See* U.S. Br. in *Medellín I*, at 21-26 (explaining that the Senate ratified the convention based on the Executive Branch's representation that it would not change U.S. law); U.S. Br. in *Sanchez-Llamas*, at 22 (same). This interpretation of the ratification process is confirmed throughout the record of those proceedings, which contains Executive Branch testimony expressly assuring the Senate that the Convention would not alter domestic law:

> "The Vienna Consular Convention does *not have the effect of overcoming Federal or State laws* beyond the scope long authorized in existing consular conventions." S. Exec. Rep. No. 91-9 (emphasis added).[20]

The Senate Foreign Relations Committee, in turn, explicitly cited as a factor in its endorsement of the treaty that "[t]he *Convention does not change or affect present U.S. laws or practice*." *Id.*, at 2 (emphasis added). And, shortly after ratification, the State Department sent a letter to all 50 governors explaining that the Convention would not require "significant departures from the existing practice within the several states of the United States." *Li*, 206 F.3d, at 64.

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[20] The Department's Senate testimony also emphasized the Vienna Convention's preamble, which states explicitly that the treaty's purpose is "not to benefit individuals." Appendix, S. Exec. Doc. E, 91-1 (1969).

Now, some five decades later, the United States urges an interpretation of the Convention that would not only "affect" U.S. laws, it would require state courts to set aside long-standing state laws of criminal procedure – despite the Senate's express understanding to the contrary.

4. Congress has clearly articulated in the AEDPA its policy preferences regarding the significant deference that should be accorded state criminal judgments.

For decades, Congress has placed significant limitations on federal oversight of state criminal proceedings. The AEDPA represents the most exhaustive articulation of Congress's policy preferences with respect to state criminal convictions, and, for four reasons, the Presidential Memorandum conflicts with those preferences.

First, the AEDPA mandates substantial federal deference to state criminal convictions. *See, e.g.*, 28 U.S.C. §2254(d). As the Court has recognized, there is "no doubt" that the AEDPA was enacted to "further the principles of [federal-state] comity, finality, and federalism," and that it is intended "to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings." *Williams* v. *Taylor*, 529 U.S. 420, 436 (2000). The Presidential Memorandum fails to reflect that deference and respect for state judgments.

Second, the AEDPA strongly disfavors subsequent habeas applications. *See, e.g.*, 28 U.S.C. §2244(b). In contrast, the Presidential Memorandum mandates that subsequent habeas applications be permitted for all 51 named Mexican nationals.

Third, the AEDPA fixes the source of law that can be applied to upset state court convictions – to "clearly established Federal law, as determined *by the Supreme Court of the United States*." 28 U.S.C. §2254(d)(1) (emphasis added). Thus, on federal habeas, a state conviction cannot be set aside, even pursuant to binding precedent from a federal court of appeals; *a fortiori*, a decision of the ICJ (or a memorandum from the President) is beyond the AEDPA purview for setting aside a final state conviction.

And fourth, the AEDPA prescribes that federal treaty claims receive less exacting habeas scrutiny than do constitutional claims. Specifically, Congress has limited federal habeas appeals to those claims on which a certificate of appealability has issued, 28 U.S.C. §2253(c)(1), and a certificate is available "*only* if the applicant has made a substantial showing of the denial of a *constitutional* right." 28 U.S.C. §2253(c)(2) (emphases added). Thus, Congress's intention was clear: to allow a COA for constitutional claims, but not for claims of statutory or treaty violations. *See Slack* v. *McDaniel*, 529 U.S. 473, 483 (2000) (taking "due note" that in enacting the AEDPA, Congress substituted "constitutional right" for "federal right," which had been the prior standard).[21] Notably, the United States has expressly embraced the view that treaty-based claims such as Medellín's are excluded from AEDPA review. *See* U.S. Br. in *Medellín I*, at 13-15.

To be sure, the AEDPA applies only to federal habeas proceedings, and so the United States could respond that all of these limitations are irrelevant as far as state habeas is concerned. But, these limitations reflect Congress's expressed view on how circumscribed *federal intervention* with state criminal judgments should be, and if the Presidential Memorandum is anything, it is federal intervention. The Presidential Memorandum rejects each of these limits, and does so while claiming congressional acquiescence. Moreover, the Presidential Memorandum purports to require the state courts to conduct a review that, under the AEDPA, the federal courts could not undertake. *See* Part II.B, *infra*.[22]

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[21] "To obtain a COA under §2253(c), a habeas petitioner must make a substantial showing of the denial of a constitutional right. . . ." *Id.*, at 483-84.

[22] There is no doubt that claims raised under the Vienna Convention are subject to the AEDPA's limitations. *Breard*, 523 U.S., at 376 ("Breard's ability to obtain relief based on violations of the Vienna Convention is subject to [the] subsequently enacted [AEDPA], just as any claim arising under the United States Constitution would be.").

C. The Court's Previous Recognition of the President's Independent Authority to Resolve Disputes With Foreign Nations Does Not Support the Assertion of Power in the Presidential Memorandum.

To support the validity of the Presidential Memorandum, the United States relies upon the Court's previous decisions recognizing a limited set of circumstances in which the President may wield independent authority in the field of international relations. *See United States* v. *Belmont*, 301 U.S. 324 (1937); *United States* v. *Pink*, 315 U.S. 203 (1942); *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981); and *Am. Ins. Ass'n* v. *Garamendi*, 539 U.S. 396 (2003); *see also* U.S. Br., at 12-16.

But these cases do not support the sweeping limitless executive power to resolve disputes with foreign nations proposed by the United States. Rather, in each case the Court's decision turned on Congress's demonstrated acceptance of the asserted presidential authority. *See, e.g.*, *Pink*, 315 U.S., at 227-28; *Dames & Moore*, 453 U.S., at 680-82; *Garamendi*, 539 U.S., at 415. Precisely the opposite is true here. *See* Part I.B, *supra*. The Senate ratified the treaties on the clear understanding that (1) they would not create individual rights, (2) any enforcement of an ICJ decision would be diplomatic or political, not judicial, and (3) they would not affect or alter U.S. law. The Presidential Memorandum contradicts all three prerequisites to Senate ratification, and also runs contrary to the policy preferences expressed by Congress in the AEDPA. Accordingly, because the memorandum lacks any record of congressional acquiescence – indeed, is contrary to the will of Congress – it finds no support in *Dames & Moore* and *Garamendi*, nor in *Pink* and *Belmont*.

As an initial matter, all four cases concerned a narrow subset of cases: civil claims between individuals and foreign governments (or foreign companies). As the Court explained in *Garamendi*,

> "[m]aking executive agreements to settle claims of American nationals against foreign governments is a particularly longstanding practice, the first example being as early as 1799. . . . Given the fact that

> the practice *goes back over 200 years and has received congressional acquiescence throughout its history*, the conclusion '[t]hat the President's control of foreign relations includes the settlement of claims is indisputable.'" *Garamendi*, 539 U.S., at 415 (emphasis added) (quoting *Pink*, 315 U.S., at 240 (Frankfurter, J., concurring), and citing *Belmont*, 301 U.S., at 330-31, and *Dames & Moore*, 453 U.S., at 682).

In *Dames & Moore*, the Court enforced an executive order suspending the claims of American nationals against Iran and subjecting them to binding arbitration in an Iran-United States Claims Tribunal pursuant to a hostage-release agreement with Iran. *Dames & Moore*, 453 U.S., at 686. The Court based its "narrow[]" decision on the ground that claim settlement by executive agreement was a longstanding practice to which Congress had acquiesced. *Id.*, at 678-80, 688. Indeed, the Court stressed that, "[c]rucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement." *Id.*, at 681.

In *Garamendi*, the Court held that a California statute requiring California insurers that sold insurance policies in Europe during the Holocaust to disclose certain information pertaining to those policies was preempted by the President's direct exercise of foreign-affairs authority. *Garamendi*, 539 U.S., at 401. The preemption was specifically based on the President's effort to negotiate a settlement, signed by the President and the Chancellor of Germany, resolving Holocaust-era claims with Germany through the German Foundation Agreement. *Id.*, at 401, 405. In *Garamendi*, as in *Dames & Moore*, the Court focused centrally on centuries of congressional acquiescence to the "particularly longstanding practice" of making executive agreements to settle the claims of American nationals against foreign governments. *Id.*, at 414-15.[23]

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[23] Additionally, one of the acknowledged purposes of the California statute at issue in *Garamendi* was to encourage "the development of a resolution to [Holocaust-era insurance claim] issues *through the international process* . . ." *Id.*, at 410-11 (internal quotation omitted) (emphasis

(Continued on following page)

And likewise, in both *Pink* and *Belmont*, the Court gave effect to an executive agreement with the Soviet Union that assigned all Soviet assets in the United States to the federal government for the purpose of settling outstanding claims between the Soviet government and American citizens. *Belmont*, 301 U.S., at 330; *Pink*, 315 U.S., at 228-30. As with *Dames & Moore* and *Garamendi*, both cases involved the settlement of civil claims against foreign nations, a practice to which Congress has long acquiesced. Moreover, *Pink* and *Belmont* also both implicated the President's authority to recognize and establish diplomatic relations with a foreign nation,[24] a power not at issue in the case at bar.

Thus, each of the cases relied upon by the United States involves an extensive pattern of congressional acquiescence to a narrow category of presidential action. Here, in contrast, there is no history whatsoever of congressional acquiescence to executive action that purports to direct state courts to (1) implement a decision of a foreign tribunal, (2) set aside state law to the contrary, (3) disregard a holding of this Court, and (4) reopen final criminal judgments – all while acknowledging that no treaty or foreign agreement requires such a course of action. Indeed, the very notion of historic congressional acquiescence to presidential action presupposes that there is "precedent" for the act. In this case, however, the United States itself has candidly acknowledged, as it must, that the Presidential Memorandum is "unprecedented."

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added). Thus, *Garamendi* concerned a State passing legislation in order to directly interfere in international affairs, the legitimate province of the national government. *See also Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363 (2000). In contrast, the Texas criminal procedure statute at issue here is neutral and generally applicable, targeted only to the administration of Texas's criminal justice system and the punishment of crimes committed in Texas against Texans. By no means was it designed to entangle Texas in an international dispute.

[24] *Pink*, 315 U.S., at 229 (describing the "[p]ower to remove such obstacles to full recognition as [the] settlement of claims of our nationals . . . [as] a modest implied power of the President").

D. The Executive Branch's Prior Responses to ICJ Decisions Fail to Show That Congress Has Acquiesced to This Assertion of Presidential Power.

Finally, the United States maintains that a prior history of congressional "acquiescence" to the President's responses to ICJ decisions supports the conclusion that it has likewise acquiesced to the assertion of executive power to respond to *Avena* reflected in the Presidential Memorandum. *See* U.S. Br., at 19-21. But the fact that Congress approved, either expressly or by implication, the President's response to any given ICJ order does not mean Congress has therefore impliedly acquiesced to *any and all* responses to ICJ decisions. And a review of the United States's prior responses, including those cited by the United States, only establishes that the Presidential Memorandum is an "unprecedented" action, with no underpinning of implied congressional approval.

A review of the United States's catalog of prior presidential responses to ICJ decisions, U.S. Br., at 19-21, demonstrates that they bear almost no resemblance to what is attempted through the Presidential Memorandum. First, the United States points to the President's response to the ICJ's decision in *Case Concerning Military and Paramilitary Activities in & Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27), that the U.S. owed reparations to Nicaragua for its violation of a bilateral treaty. U.S. Br., at 20. In that case, the President decided that the U.S. would *not* comply with the ruling, and when Nicaragua attempted to raise the issue in the Security Council, the United States vetoed the resolution. *Id.* To say the least, a prior decision to *ignore* an ICJ decision provides little precedent for a President's order that state courts must obey an ICJ decision.[25]

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[25] Indeed, the *Nicaragua* case exemplifies the federal government's understanding that enforcement of ICJ decisions would take place through the Security Council and diplomatic channels.

The United States also relies upon the President's response to provisional measures issued by the ICJ in the *LaGrand* case, which sought to prevent Walter LaGrand's execution. U.S. Br., at 20 (citing 2001 I.C.J. 515-17). There, the Executive Branch concluded that the ICJ's provisional measures in *LaGrand* were not binding of their own force. *See id.* When, as in *Avena*, the ICJ ordered the review and reconsideration of convictions and sentences of German nationals denied consular notification in the future, *id.* (citing 2001 I.C.J. 515-16, ¶128(7)), the President did not issue any order to state courts to comply. Instead, the State Department sent letters to state governors, parole boards, and clemency boards encouraging them to consider the violations of the right to consular notification in cases involving the death penalty. *Id.*, at 20-21. Once again, it is unclear how a prior practice of sending hortatory letters – and, presumably, congressional acquiescence to such epistolary exchange – is somehow "precedent" for a mandatory presidential directive to the state judiciary, purporting to have preemptive force of law.[26]

What is precedential is how the United States has historically treated claims under the Vienna Convention. And,

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[26] The other examples cited by the United States are likewise unpersuasive. *Case Concerning Rights of Nationals of the United States of America in Morocco* (Fr. v. U.S.), 1952 I.C.J. 176 (Aug. 27), was never enforced by the U.S. government because it was limited to the legal status of U.S. citizens in Morocco. And the *Gulf of Maine* decision is distinguishable for two reasons. *See Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Can. v. U.S.), 1984 I.C.J. 246 (Oct. 12). First, that case involved the setting of an international boundary. *See id.* As the Court has recognized, the setting of an international boundary does not necessarily affect boundaries under U.S. domestic law. *See United States* v. *Alaska*, 503 U.S. 569, 588-89 & n.11 (1992). Second, the *Gulf of Maine* decision did not need to be "interpreted" because the boundary dispute was referred to the ICJ pursuant to a narrowly drafted bilateral agreement between the U.S. and Canada that was heavily amended and ratified by the Senate. *See* Treaty to Submit to Binding Dispute Settlement the Delimitation of the Maritime Boundary in the Gulf of Maine Area, U.S.-Canada, Nov. 20, 1981, 33 U.S.T. 2797. The Senate cut the boundary issue out of a broader treaty governing fisheries. It is therefore unsurprising that Congress would not second-guess the President's instructions to federal agencies to comply with the new international boundary.

for decades, the State Department has consistently maintained that the Vienna Convention does not create individual rights. In *United States* v. *Li*, the First Circuit posed the question whether the Vienna Convention creates individual rights, and the State Department specifically advised the court that the Convention is a treaty that establishes state-to-state rights and obligations, *not* individual rights. 206 F.3d, at 63 (citing "Department of State Answers to the Questions Posed By the First Circuit in *United States* v. *Nai Fook Li*" "State Department *Li* Answers," at A-1, A-3).

The State Department also addressed the remedies for violations of the consular notification procedures of the Convention: "The [only] remedies for failures of consular notification under the [Vienna Convention] are diplomatic, political, or exist between states under international law." *Id.* As *Li* noted, the State Department's position on the Convention may be traced to the treaty's inception. The court first pointed to the 1970 letter sent by a State Department legal adviser to the governors of the fifty States, shortly after the Convention's ratification, advising that the Department did "not believe that the Vienna Convention will require significant departures from the existing practice within the United States." *Id.*, at 64.

Likewise, *Li* also pointed to the State Department's written submission to the Inter-American Court of Human Rights in 1998, when Mexico sought an advisory opinion on the availability of criminal remedies for failures of consular notification – the precise issue raised in this case. The Department's submission unequivocally stated that the Vienna Convention "*does not require the domestic courts of State parties to take any actions in criminal proceedings*, either to give effect to its provisions or to remedy their alleged violation." *Id.* (emphasis added). The *Li* court thus correctly concluded that "the Department has denied the availability of criminal remedies for failures of consular notification." *Id.*

That is the United States's position to which there is a decades-long pattern of congressional acquiescence. And that is the position that the United States abruptly changed with the issuance of the Presidential Memorandum.

The magnitude of the change is best illustrated by the United States's response to the *Breard* case, which – tellingly – is omitted from the catalog of Executive Branch responses to the ICJ. *See* U.S. Br., at 19-21. In that case, Angel Francisco Breard, a Paraguayan national sentenced to death in Virginia, raised a claim under the Vienna Convention. *Breard*, 523 U.S., at 373. After American courts held that any claims Breard had under the Vienna Convention were procedurally defaulted, Paraguay instituted proceedings against the United States in the ICJ. *Id.*, at 373-74. The ICJ subsequently issued an order that the United States "take all measures at its disposal to ensure that [Breard] is not executed pending the final decision in [the ICJ's] proceedings." *Id.*, at 374.

The Executive Branch's response to the ICJ's *Breard* order was much like that in *LaGrand*: "The Executive Branch . . . in exercising its authority over foreign relations may, and in this case did, utilize diplomatic discussion with Paraguay." *Id.*, at 378. The President also responded to the *Breard* order, as in *LaGrand*, by having the Secretary of State "[send] a letter to the Governor of Virginia requesting that he stay Breard's execution." *Id.*

And, to remove all doubt as to its view of the President's authority, the United States expressly advised this Court:

> "Our federal system imposes limits on the federal government's ability to interfere with the criminal justice systems of the States. *The measures at [the United States'] disposal under our Constitution may in some cases include* ***only persuasion*** – such as the Secretary of State's request to the Governor of Virginia to stay Breard's execution – and not legal compulsion through the judicial system. ***That is the situation here.***" Brief for the United States as Amicus Curiae in *Breard*, at 51 (emphases added, brackets in the original, and quotations omitted).

Thus, in 1998, it was the explicit position of the United States that, "under our Constitution," the "only" measure available for the Executive to respond to an order

from the ICJ was "persuasion" – other than that, the President had no "ability to interfere with the criminal justice systems of the States." *Id.*

II. THE PRESIDENTIAL MEMORANDUM IMPERMISSIBLY INTRUDES ON THE AUTHORITY OF THE JUDICIARY.

A. The Presidential Memorandum Impermissibly Intrudes on the Authority of This Court.

This case is controlled by *Sanchez-Llamas*. Just last Term, the Court decided the questions raised by Petitioner, to wit:

- The Court held that, "[a]lthough the ICJ's interpretation deserves 'respectful consideration,' we conclude that it does not compel us to reconsider our understanding of the Convention in *Breard*." 126 S.Ct., at 2683 (internal citation omitted).
- The Court held that "[n]othing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts," and that the UN Charter's "procedure for noncompliance – referral to the Security Council by the aggrieved state – contemplates quintessentially *international* remedies." *Id.*, at 2684-85 (emphasis in the original).
- And, therefore, the Court expressly concluded, "as [it] did in *Breard*, that claims under Article 36 of the Vienna Convention may be subjected to the same procedural default rules that apply generally to other federal-law claims." *Id.*, at 2687.

Indeed, the Court went one step further, and answered the precise question raised by Petitioner: whether he can be barred from filing a successive habeas petition raising his claim under *Avena*. The Court was unequivocal:

> "If the State's failure to inform the defendant of his Article 36 rights generally excuses the defendants' failure to comply with relevant procedural rules, then presumably rules such as statutes of limitations and *prohibitions against filing successive habeas petitions* must also yield in the face of Article 36 claims.

> *This sweeps too broadly*, for it reads the 'full effect' proviso in a way that leaves little room for Article 36's clear instruction that Article 36 rights 'shall be exercised in conformity with the laws and regulations of the receiving State.'" 126 S.Ct., at 2686 (quoting Article 36) (emphases added).

Given the Court's explicit holdings in *Sanchez-Llamas*, resolution of this case should be simple. Medellín argues, however, that his case is different, because he was expressly named in *Avena*. Pet'r Br. 21-22. That claim to *res judicata* is unpersasive. *See* Part VII, *infra*. The United States, however, has a different argument.

The United States argues that the Texas court should not follow *Sanchez-Llamas*. Instead, the United States urges, the Presidential Memorandum should provide the governing rule.

It is beyond peradventure that the President cannot overrule the Supreme Court as to "what the law is." Yet that is the import of the United States's argument. Although the memorandum predated *Sanchez-Llamas* (and post-dated *Breard*), the United States argues that it, and not this Court's decision, should govern the state court's analysis. Such a contention is irreconcilable with this Court's Article III role as expositor of federal law. *See generally* Amicus Br. of Former Senior Department of Justice Officials.

Nor is the United States's theory saved by the notion that the memorandum was drafted in response to the international law obligation created by the *Avena* decision. In *Sanchez-Llamas*, Petitioners' amici urged that, because the ICJ had "interpreted the Vienna Convention to preclude application of procedural default rules to Article 36 claims," the United States was "*obligated* to comply with the Convention, *as interpreted by the ICJ*." 126 S.Ct., at 2683 (emphases in the original). The Court, in turn, squarely rejected that contention. *Id.*

The *Sanchez-Llamas* decision itself refutes the United States's argument. As the Court explained, "[i]f treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law 'is

emphatically the province and duty of the judicial department,' headed by the 'one supreme Court' established by the Constitution." *Id.* (quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). And the Court concluded that it was "against this background that the United States ratified, and the Senate gave its advice and consent to, the various agreements that govern referral of Vienna Convention disputes to the ICJ." *Id.*

Simply put, only the Supreme Court – not the President and not the ICJ – can determine whether the Vienna Convention, the Optional Protocol, or any other federal law requires the displacement of state procedural-default doctrines or state successive habeas prohibitions. And for the United States to assert otherwise is to intrude impermissibly into the constitutional obligations of Article III courts.

B. The Presidential Memorandum Also Impermissibly Intrudes on the Authority of the State Judiciary.

The United States urged, in *Sanchez-Llamas*, that "'it is beyond dispute that [this Court] do[es] not hold a supervisory power over the courts of the several States.'" U.S. Br. in *Sanchez-Llamas*, at 33 (quoting *Dickerson* v. *United States*, 530 U.S. 428, 438 (2000)). The Court expressly agreed:

> "We . . . agree with . . . Oregon and the United States that our authority to create a judicial remedy applicable in state court must lie, if anywhere, in the treaty itself." 126 S.Ct., at 2679.

The United States's argument was not without irony, in that the "authority to create a judicial remedy applicable in state courts" is precisely what the President is now claiming. And *Sanchez-Llamas* further made clear that the treaty provides no such mandate:

> "Any interpretation of law the ICJ renders in the course of resolving particular disputes is thus not binding precedent *even as to the ICJ itself*; there is accordingly *little reason to think that such interpretations were intended to be controlling on our courts*." *Id.*, at 2684 (second emphasis added).

For the same reason that this Court lacks general "supervisory power over the courts of the several States," so too (even more so) does the President. Yet that is in effect what the United States is asserting. And although the claimed authority is limited to the state courts, the United States nowhere explains why it could not just as well apply to the federal courts. And, as Justice Ginsburg noted,

> "it would be unseemly, to say the least, for this Court to command state courts to relax their identical, or even less stringent procedural default rules, while federal courts operate without constraint in this regard." 126 S.Ct., at 2689 (Ginsburg, J., concurring in the judgment).

Additionally, the United States claims the remarkable power to order the state courts to reopen final judgments and decide cases differently. In the instant case, Petitioner has already, on first state habeas, presented his Vienna Convention claim to the Texas Court of Criminal Appeals, and the Texas court has rejected that claim as procedurally barred. The ICJ disapproved of that decision, and, accordingly, so did the President. Therefore, the Presidential Memorandum provides that the Texas court should go back and reconsider the claim it has already rejected, this time without relying on its previous grounds for decision.

Such a power of executive revision of judicial decisions is wholly outside the President's authority. *See Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792). It is well-established that the political branches of government may not "'prescribe rules of decision to the Judicial Department . . . in cases pending before it.'" *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995) (quoting *United States* v. *Klein*, 13 Wall. 128, 146 (1872)); *see also Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429 (1992). *See generally* Amicus Br. of Constitutional Law Scholars. Yet that is what the United States is attempting to do.

Not only does the Presidential Memorandum direct state courts to revisit claims previously rejected, it orders those courts to discover jurisdiction where none previously existed. In the words of Judge Keasler's plurality, the memorandum improperly intrudes into the independent power of

the judiciary by attempting to "dictate to the judiciary . . . how to interpret the applicable law." Pet. App. 30a.

Moreover, as the Court explained in *Alden* v. *Maine*, Congress (and, *a fortiori*, the President) cannot force the state courts to do anything that it could not direct the federal courts to carry out:

> "It would be an *unprecedented step* . . . to infer from the fact that Congress may declare federal law binding and enforceable in state courts the further principle that *Congress' authority to pursue federal objectives through the state judiciaries exceeds* not only its power to press other branches of the State into its service but even *its control over the federal courts themselves*. The conclusion would imply that Congress may in some cases act only through instrumentalities of the States. Yet, as Chief Justice Marshall explained: 'No trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends.'" 527 U.S. 706, 752 (1996) (emphases added) (quoting *M'Culloch* v. *Maryland*, 4 Wheat. 316, 424 (1819)).

The President surely could not direct a federal district court or this Court to discover jurisdiction where none previously existed, and neither can he constitutionally direct the state courts to do the same.

III. THE PRESIDENTIAL MEMORANDUM IMPERMISSIBLY INTRUDES ON THE AUTHORITY OF THE STATES.

The Presidential Memorandum also impermissibly attempts to assert federal power over the States in a manner prohibited by the Constitution. Even the federal government acting as a whole may not alter the structure of state government or commandeer the state judiciary in order to implement federal policy. Yet these are the results contemplated by the memorandum, which purports to expand the jurisdiction of

Texas courts so that they may provide further review of Medellín's case.

As the Court has explained:

> "The federal system established by our Constitution preserves the sovereign status of the States in two ways. First, it reserves to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status. . . . Second, even as to matters within the competence of the National Government, the constitutional design secures the founding generation's rejection of the 'the concept of a central government that would act upon and through the States' in favor of 'a system in which the State and federal Governments would exercise concurrent authority over the people.'" *Alden*, 527 U.S., at 714 (quoting *Printz*, 521 U.S., at 919-20).

Thus, the constitutional structure preserves state sovereignty by (1) securing the States' authority as sovereigns to "order the processes of [their] own governance," *id.*, at 752, and (2) prohibiting the federal government from treating the States as "mere political subdivisions of the United States," commandeering the machinery of state government to implement federal policy, *New York*, 505 U.S., at 188.

The Presidential Memorandum contravenes both of these protections of state sovereignty. *See generally* Amicus Br. of Virginia, 27 Other States, and Puerto Rico.

A. The Presidential Memorandum Impermissibly Seeks to Alter the Structure of the Texas Judiciary in Order to Implement *Avena*.

Under our federal system, "'States possess primary authority for defining and enforcing the criminal law.'" *Brecht* v. *Abrahamson*, 507 U.S. 619, 635 (1993) (quoting *Engle* v. *Isaac*, 456 U.S. 107, 128 (1982)). The Court aptly summarized this fundamental principle in *United States* v. *Morrison*, 529 U.S. 598 (2000): "Indeed, we can think of no better example of the police power, which the Founders denied the National

Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Id.*, at 618.

Similarly, the States have broad sovereign authority over their own judicial processes, including state-law habeas procedures. Thus, "[w]hen a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts, [the Court] must act with utmost caution before deciding that it is obligated to entertain the claim." *Howlett* v. *Rose*, 496 U.S. 356, 372 (1990). As the Court explained, "[t]he general rule, 'bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.' *The States thus have great latitude to establish the structure and jurisdiction of their own courts.*" *Id.* (emphasis added and citations omitted).[27]

Article 11.071 of the Texas Code of Criminal Procedure governs the jurisdiction of Texas courts to consider the merits of subsequent applications for state habeas relief filed in a death penalty case. *See Ex parte Graves*, 70 S.W.3d 103, 115 (Tex. Crim. App. 2002). Applying the text of Article 11.071, the Texas Court of Criminal Appeals determined that Texas courts lack jurisdiction to provide Medellín further habeas review.

Medellín and the United States assert that the Presidential Memorandum nonetheless requires Texas courts to provide review and reconsideration of Medellín's case, displacing Article 11.071 and creating previously nonexistent state-habeas jurisdiction. But neither the President's foreign-affairs powers under Article II nor the Supremacy Clause can support an attempt to force Texas to enlarge the jurisdiction of its courts. *See De Geofroy* v. *Riggs*, 133 U.S. 258, 267 (1890) (noting that the "treaty power" shall not "authorize what the constitution forbids[] or a change in the character of the government[] or in that of one of the states").

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[27] The States' discretion as sovereigns to prescribe their judicial processes is a particularly strong consideration when the State is not required to provide *any* access to the courts, as is the case with habeas corpus. *See Pennsylvania* v. *Finley*, 481 U.S. 551, 556-57 (1987) ("States have no obligation to provide [postconviction] relief.").

This bedrock principle was restated in *Erie R.R. Co.* v. *Tompkins*: "The Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States – independence in their legislative and independence in their judicial departments." 304 U.S. 64, 78 (1938). In short, the Court has made it "quite clear that it is a matter for each State to decide how to structure its judicial system." *Johnson* v. *Fankell*, 520 U.S. 911, 922 n.13 (1997).

B. The Presidential Memorandum Also Contravenes the Anticommandeering Doctrine Because it Conscripts State Courts to Implement a Federal Obligation.

The Court has recognized that, in order to protect the States' residual sovereignty, the Framers rejected a system under which the States would have operated as the instruments of the federal government in favor of "'a Constitution that confers upon Congress the power to regulate individuals, not States.'" *Printz*, 521 U.S., at 920 (quoting *New York* v. *United States*, 505 U.S. 144, 166 (1992)). Accordingly, the Constitution does not permit the federal government to require States to pass legislation according to its instructions. *See New York*, 505 U.S., at 162. Rather, "[i]t is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority." *Printz*, 521 U.S., at 928.

These principles animate the anticommandeering doctrine that the Court recognized in *New York* and *Printz*. *Id.*, at 925-26; *New York*, 505 U.S., at 175-77. Although the Court has only had occasion to apply the anticommandeering doctrine to the legislative and executive branches of state government, its principles are equally applicable here. The state judiciary, like the state legislature or executive, is an independent and co-equal branch of state government. And like the state legislative and executive branches, the state judiciary is neither a "regional office[ ]" nor an "administrative agenc[y] of the Federal Government," and the state courts "appear nowhere on the Federal Government's most detailed organizational chart." *New York*, 505 U.S., at 188. Nor does the state judiciary warrant any

less protection from outside sovereigns: as the Court has recognized, a state's allocation of the "separate duties of the judicial and political branches of the state government[]" goes "to the heart of representative government." *Alden*, 527 U.S., at 751 (quoting *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991)).

Medellín argues that *Testa* v. *Katt*, 330 U.S. 386 (1947), authorizes the commandeering of the state judiciary, Pet'r Br., at 32, but *Testa* does no such thing. At issue in *Testa* was simply whether Congress may "pass laws enforceable in state courts." *New York*, 505 U.S., at 178. In concluding that federal law is enforceable in state court, the Court did not reason that the federal government may conscript the state judiciary as such – and it certainly did not conclude that the federal government may control the *jurisdiction* of state courts. To the contrary, the Court recognized only that "[f]ederal law is enforceable in state courts . . . because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature." *Howlett*, 496 U.S., at 367; *Testa*, 330 U.S., at 392. Because the *body of law* applicable in state court includes federal law – and hence "'[t]he two together form one system of jurisprudence, which constitutes the law of the land for the state,'" *Mondou* v. *New York, N. H. & H. R.R. Co.*, 223 U.S. 1, 58 (1912) – a state court with "jurisdiction adequate and appropriate *under established local law*" must adjudicate federal actions, *Testa*, 330 U.S., at 394 (emphasis added).

Testa and its progeny "all involve congressional regulation *of individuals*, not congressional requirements that States regulate." *New York*, 505 U.S., at 178 (emphasis added). The Court has thus noted, "as a matter of some significance, that Congress had not attempted [in these cases] 'to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure.'" *Howlett*, 496 U.S., at 373 (quoting *Mondou*, 223 U.S., at 56, 57).

IV. THE ARGUMENTS PRESENTED BY THE UNITED STATES IN SUPPORT OF THE PRESIDENTIAL MEMORANDUM DO NOT READILY ADMIT ANY WORKABLE LIMITING PRINCIPLE.

If the United States were to prevail with its broad theories in support of the "unprecedented" Presidential Memorandum, that precedent could, in turn, open the door to a host of potential abuses from future Presidents. The core of the United States's argument proceeds as follows: (1) the Senate has ratified treaties giving the ICJ authority to adjudicate disputes, (2) the ICJ's decision in *Avena* is a binding obligation on the United States, (3) although *Avena* would ordinarily have no domestic legal application, because the President is preeminent in foreign affairs he can choose the appropriate means to satisfy the obligation of *Avena*, (4) because the obligation originates from treaties, his choice of means is federal law at the zenith of his *Youngstown* authority, and so (5) he may conscript state courts and set aside any conflicting state laws. And all of this, it is to be remembered, is *after* this Court has expressly held that the underlying treaties require no "review and reconsideration" whatsoever.

Under those theories, whenever the President could locate an extant obligation in international law, grounded in some general treaty commitment, the President would have at least an arguable basis to set aside any state laws to the contrary. Given the multiple broad and specific treaty commitments of the United States – many non-self-executing, like the Optional Protocol – the predicate is laid for potentially far-reaching preemptive presidential power.

Moreover, the theories advocated by the United States do not readily admit a workable limiting principle. For example, under those same theories, little would prevent a President:

1. from ordering federal district courts to "review and reconsider" final federal habeas determinations, notwithstanding the AEDPA;
2. from ordering *this Court* to "review and reconsider" its holding in *Sanchez-Llamas*;

3. from ordering state or federal courts to annul all 51 convictions and sentences; or

4. from ordering the governors of the respective States to grant full pardons to all 51 convicted murderers.[28]

The United States would no doubt respond, with respect to the first two examples above, that the Supremacy Clause does not preempt federal law the way it does state law. But the United States's theory is that the Presidential Memorandum is a new manifestation of federal law, and so the United States could urge that it, too, is binding on the federal courts (much as the argument is made in the instant case that *this* Court should apply the Presidential Memorandum, and not *Sanchez-Llamas*). And, while the second two examples may seem somewhat attenuated, it bears emphasis that Mexico expressly sought from the ICJ "annulment" of the convictions in *Avena*. *See* Pet. App. 163a. Had the ICJ obliged, it is difficult to perceive – in the theories advanced by the United States – why the third or fourth examples above would not be equally suitable means for carrying out that ICJ order.

The United States could also be heard to answer that the claimed authority extends only to instances where there is a mandatory judgment against the United States from an international tribunal. But nothing in the arguments put forth by the United States turns on a prior adjudication. Instead, the argument is that (1) there is an extant international law obligation on the United States, and so (2) the President may act to effectuate that obligation. That same justification could apply to other existing treaty obligations as well. For example, the International Convention on Civil and Political Rights, 6 I.L.M. 368 (1967) (entered into force Sept. 8, 1992), has numerous broad provisions that can be characterized as current treaty obligations of the United

[28] This would of course be in circumvention of the limitation of the Article II, section 2, pardon power to *federal* offenses, but it would still arguably be a logical extension of the United States's argument.

States.[29] Under the justifications advanced in this case, the President would arguably have the authority to make those obligations self-executing and to set aside any state laws deemed to conflict with those obligations, all without ever securing congressional agreement.[30]

And these examples do not even begin to chronicle the host of state laws – environmental laws, tort laws, consumer protection laws, marriage laws, adoption laws, laws providing for capital punishment – that a future President could possibly deem in conflict with treaty obligations and could therefore attempt to unilaterally set aside "in accordance with general principles of comity." Pet. App. 187a.

For that very reason – to limit unchecked unilateral power – our constitutional system typically requires interbranch cooperation before setting aside laws adopted by democratically-elected state legislatures. As then-Justice Rehnquist observed for the Court in *Dames & Moore*,

> "'The example of . . . unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image.'" 453 U.S., at 662 (quoting *Youngstown*, 343 U.S., at 641 (Jackson, J., concurring)).

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[29] *See, e.g.*, Article 1, ¶1 ("All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."); Article 6, ¶4 ("Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.").

[30] Although the Senate entered reservations limiting the rights conferred to the scope provided by the U.S. Constitution and indicating that those provisions were not self-executing, S. EXEC. REP. No. 102-23, at 1 (1992), those were the very same implied understandings under which the Senate ratified the Vienna Convention and the Optional Protocol, see Part I.B, *supra*.

V. THE EXECUTIVE BRANCH, COORDINATING WITH EITHER CONGRESS OR THE STATES, CAN COMPLY WITH *AVENA*.

Nobody disputes that the United States has an international law obligation to satisfy *Avena*. Should the President choose to comply with that obligation, there are constitutional avenues available. But, to change domestic law, the President must first coordinate with Congress or the States.

For example, the President could coordinate with Congress to provide a statutory federal habeas remedy – likely an exception to the AEDPA's prerequisites for federal habeas review – that would apply to the 51 Mexican nationals affected by *Avena* and that would provide further judicial review of their cases consistent with *Avena*. Although that would not necessarily be free of all constitutional challenge, such a remedy would at a minimum be backed by the full authority of the federal government at its zenith.

Likewise, further review of these 51 cases might also be achieved by means of a treaty with Mexico, duly ratified by the Senate, which contained a provision expressly incorporating *Avena*'s requirement for further federal judicial review of these cases and which denominated such provision as self-executing federal law. This, too, would employ the full force of the national government's authority.

Alternatively, as Texas expressly urged the Department of Justice, the Executive Branch could choose to work directly with the States to comply with *Avena*. Specifically, the President could issue an Executive Order to provide an executive "review and reconsideration" panel for the 51 Mexican nationals referenced in *Avena*, consisting of, for example, retired federal judges appointed by the Attorney General.[31] And, in any instances in which the executive

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[31] Although *Avena* specified that any review and reconsideration must occur within the judiciary, Pet. App. 165a, 174a, it also left the means to the United States's choosing, Pet. App. 185a. This approach, while perhaps not perfect compliance, would go considerably further than simply refusing to comply (the course chosen in the Nicaragua case) and would be unquestionably constitutional.

review panel found actual prejudice, the Attorney General could then convey that fact to the state pardon and parole authorities, along with the President's request that that demonstration be given great weight in state clemency proceedings.[32]

Any of these paths would allow the President to comply with the United States's international obligations under *Avena* while respecting the Constitution's limits on his authority.

VI. BECAUSE THE PRESIDENTIAL MEMORANDUM RAISES PROFOUND CONSTITUTIONAL QUESTIONS, THE COURT SHOULD CONSTRUE IT ACCORDING TO ITS PLAIN TEXT – AS A REQUEST, NOT A COMMAND.

Under longstanding principles, the Court "will construe a statute in a manner that requires decision of serious constitutional questions only if the statutory language leaves no reasonable alternative." *United States* v. *Lopez*, 514 U.S. 549, 562 (1995); *see also N.L.R.B.* v. *Bishop of Chicago*, 440 U.S. 490, 500 (1979). Construing the Presidential Memorandum as a binding order raises profound questions of separation of powers and federalism.

Yet the plain text of the memorandum admits another construction. The memorandum is a two-paragraph missive to a single member of the Cabinet. It is not published in the Federal Register, and it bears none of the indicia of an Executive Order. It is not addressed to the States and not phrased in directive language. Indeed, it invokes comity, an inherently discretionary doctrine. Accordingly, to avoid constitutional doubt, the Court should treat it as a request, and not a command.

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[32] Many states, including Texas, would likely be willing to agree beforehand to accord considerable weight to any such executive findings of prejudice.

VII. *AVENA* IS NOT A BINDING JUDGMENT ENFORCEABLE BY A PRIVATE PARTY IN A DOMESTIC COURT.

Medellín asserts that the *Avena* decision is binding federal law of its own force, and that it is likewise enforceable by a private party in domestic courts. Pet'r Br., at 26-27. Medellín's argument is fatally flawed for three reasons. First, as the Court concluded in *Sanchez-Llamas* last Term, under Article III of the Constitution it is for this Court to interpret treaties as a matter of federal law, and this Court has already definitively rejected Medellín's interpretation of the treaty. *Sanchez-Llamas*, 126 S.Ct., at 2683-85. Medellín is not entitled to a different adjudication in Texas state court merely because he was mentioned by name in *Avena*.[33] He was not a party to *Avena* (nor could he have been), and so cannot claim *res judicata*; only nations were parties to *Avena*. And, under *Sanchez-Llamas*, the Texas Court of Criminal Appeals was obliged to reject his claim.

Second, nothing in the structure or purpose of the ICJ supports Medellín's conclusion that its decisions are self-executing federal law enforceable by a private party. To the contrary, the ICJ is designed to resolve disputes between nations as a matter of international law, and its decisions are enforceable only through the Security Council of the United Nations. *See* Part I.B.2, *supra*.

Finally, Medellín's assertion that *Avena* is privately enforceable of its own force is untenable because it improperly transfers to the courts the authority of the Executive and Legislative branches to determine whether non-compliance with *Avena* is appropriate, as well as how to comply if the political branches decide compliance is the correct response. For this reason, the United States has urged that *Avena* is not privately enforceable, *see* U.S. Br., at 27-29, and that determination is entitled to great deference,

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[33] The decision by its terms also does not limit itself to the Mexican nationals made the basis of the proceedings in the ICJ, but rather expressly states that it applies to all "similarly situated" foreign nationals in the United States. *See* Pet. App. 181a.

Sumitomo Shoji Am., Inc. v. *Avagliano*, 457 U.S. 176, 184-85 (1982).

VIII. MEDELLÍN HAS ALREADY RECEIVED THE JUDICIAL REVIEW PRESCRIBED BY *AVENA*.

All of Medellín's contentions are premised on the supposition that the ICJ's *Avena* decision has not been "given effect" as to Medellín, meaning that he has never received an assessment of whether the Vienna Convention violation caused him actual prejudice. But Medellín received the "actual prejudice" review prescribed by *Avena* when his first application for state habeas corpus relief was adjudicated. For that reason, Texas has already "given effect" to *Avena* in Medellín's case, and the questions of executive power and the enforceability of ICJ decisions in domestic courts are moot.

In its findings of fact and conclusions of law concerning Medellín's First Application, the state trial court rejected his Vienna Convention claim on several alternative grounds. *See Medellín I* Pet. App. 55a-57a. One of those alternative holdings, consistent with the ICJ's subsequent decision in *Avena*, addressed whether Medellín had established that the violation actually caused his conviction or punishment:

> "The applicant fails to show that his rights, pursuant to U.S. Const. amends. V, VI, and XIV, were violated and *fails to show that any non-notification of the Mexican authorities impacted on the validity of his conviction or punishment. Ex parte Barber*, 879 S.W.2d 889, 891-92 (Tex. Crim. App. 1994) (holding that, in order to be entitled to habeas relief, defendant must plead and prove that complained-of error did, in fact, contribute to his conviction or punishment)." *Medellín I* Pet. App. 57a (emphasis added).

The trial court also concluded that [redacted]ail[ed] to show that he was harmed by any lack of notification to the Mexican consulate concerning his arrest for capital murder; [Medellín] was provided with effective legal representation upon [his] request; and [his] constitutional rights were

safeguarded." *Id.*, at 56a. The Texas Court of Criminal Appeals agreed. *Id.*, at 32a-33a.

These alternative merits holdings establish that Texas courts have already provided the "actual prejudice" review prescribed by *Avena* in resolving his First Application for state habeas relief.

Because Texas already provided the review that *Avena* prescribed, the questions presented are moot. This Court, like all federal courts, lacks jurisdiction to decide moot cases because its constitutional authority extends only to actual cases or controversies. *See Iron Arrow Honor Soc'y* v. *Heckler*, 464 U.S. 67, 70 (1983) (per curiam).

CONCLUSION

The Court should affirm the judgment of the Texas Court of Criminal Appeals. Alternatively, because Texas courts have already provided the review prescribed by *Avena*, the questions presented are moot, and the writ of certiorari should be dismissed for want of jurisdiction.

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